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IN THE

Supreme Court of the United States

October Term, 1957

No. 33

MICHAEL WILSON, *et al.*,

Petitioners,

vs.

LOEW'S INCORPORATED, a corporation, *et al.*,

Respondents.

On Writ of Certiorari to the District Court of Appeal, Second Appellate District, State of California, Division Three.

BRIEF OF INDUSTRY RESPONDENTS.

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On Writ of Certiorari to the District Court of Appeal, Second Appellate District, State of California, Division Three.

BRIEF OF INDUSTRY RESPONDENTS.

Preliminary Statement.

This case began—and throughout its course below it was treated by the State Courts—as one involving only this reasonably uncomplicated question: Does the complaint state a cause of action for tortious interference by the respondents with the business relations of the petitioners? At the last moment, after judgment had gone against petitioners in the trial court and had been affirmed by the District Court of Appeal solely upon this issue of State law, a tardy and desperate effort was made by petitioners to inject into the cause a question under the Fourteenth Amendment. [See, Jurisdiction, *infra*, pp. 3-8.]

Upon that flimsy foundation there has been erected by petitioners an argument nearly limitless in the range and variety of constitutional problems discussed. The argument is almost all irrelevant, for in preponderant bulk it goes to questions which are not properly here. They are questions which were not raised or decided below. They are questions for which no adequate record exists because no one deemed them in issue below. They are questions which are not within the scope of those presented in the petition for certiorari. They are, therefore, questions which need not and should not be decided on this record and in this cause.

So far as any constitutional issue under the Fourteenth Amendment is concerned—assuming it to be properly before this Court—the central question must be whether, in the private conduct complained of, there has been any "state action" in the meaning of that term in relation to the Amendment. That, in turn, is essentially a question of accommodating and delimiting the respective spheres and intests of the Federal and State governments in the regulation of private conduct. It is a question which touches upon a sensitive spot. As has been recognized, at least since the *Slaughter House Cases*, 16 Wall. 36 (1872) and the *Civil Rights Cases*, 109 U. S. 3 (1883) were decided, it is a question of a sort the answer to which profoundly affects the basic and essential nature of the Federalism we have known since the founding.

Having regard to the independent non-federal grounds upon which the judgment was based, and also to the manner in which and the time at which the Fourteenth Amendment question was raised below, it cannot be said that even that question is properly before this Court.

[Jurisdiction, *infra*, pp. 5-8; Point I, *infra*, pp. 30-37.] Certainly, however, no other constitutional question is here.

Jurisdiction.

This Court is without jurisdiction because the federal questions sought to be reviewed were not seasonably or properly raised in, and were not decided by, any of the State courts in which the instant cause was heard [28 U.S.C., §1257(3)]; and because the judgment rests on independent non-federal grounds adequate to sustain it.

The state of the record in that regard is as follows:

1. The complaint was not framed to raise or put in issue any right under the constitution or laws of the United States. It was plainly nothing more than an attempt to state a cause of action under the law of California for tortious or unjustified interference with business relations. [R. 35-36] It was so described by petitioners in the District Court of Appeal below. [See, their Opening Brief in that court, page 1.] No federal right was alleged; no provision of the federal constitution or of any federal law was pleaded or otherwise referred to. [See, pp. 10-13, *infra*; and, *cf.*, Br. 3-7.[1]]

2. A demurrer to the original complaint was sustained, with leave to amend, on the ground that the complaint did not state facts sufficient to constitute a cause of action. [R. 16-29] It is petitioners' theory, now, that a determination by a State court that the facts alleged gave them no cause of action was such action by the State in

[1]The Brief for Petitioners is referred to herein by the abbreviation "Br."

aid of respondents' private conduct as to make that conduct a denial by the State of due process and equal protection. [Br. 31-43; 87.] If that is so, then obviously the appropriate, and certainly the latest, time at which that constitutional question should have been raised was in the proceedings taken next after the rulings on respondents' demurrer which precipitated the question. [See, Point I, B, *infra*, pp. 32-34.] That was not done. Only an amended complaint, for all practical purposes identical with the original, was filed.[2] [R. 29-41, 76-77] Still absent was any suggestion that a federal right was being asserted or a federal constitutional question was being raised.

3. A demurrer to the amended complaint was sustained without leave to amend.[3] [R. 55] This, of course, made entry of a judgment of dismissal mandatory unless the ruling was reconsidered. [*Berri v. Superior Court*, 43 Cal. 2d 856, 860, 279 P. 2d 8, 11 (1955).] A motion to reconsider, on the ground that the ruling of no cause of action violated petitioners' rights under the Fourteenth Amendment, could have been made under California's practice. [*Bank of America v. Superior Court*, 20 Cal. 2d 697, 702, 128 P. 2d 357, 360 (1942); *Frantz v.*

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[2]The only differences between the two complaints were the deletion in the later of them of the words "blacklist" and "conspiracy" in a few places and the addition of the epithetical adverb "maliciously." [R. 44] In the California practice such epithetical pleading states no fact and raises no issue. [Cases cited, note 11, *infra*, p. 10.]

[3]A demurrer by the so-called committee respondents (who, as they did in the State courts, appear here separately and by other counsel) was sustained with leave to amend. [R. 55] Petitioners, however, were satisfied with their amended pleading. They declined to amend further and permitted judgment of dismissal as to those respondents to go against them. [R. 61-62]

Mallen, 204 Cal. 159, 161, 267 Pac. 314, 315 (1928); *De La Beckwith v. Superior Court*, 146 Cal. 496, 498, 499, 80 Pac. 717, 719 (1905).] No such motion, in fact no motion to reconsider on any ground whatever, was made. [R. 55-56]

4. An appeal from the judgment of dismissal was taken to the appropriate appellate court of the State. Petitioners filed elaborate briefs, aggregating 112 pages in length, in which they discussed many questions. But they did not assert any federal right as such. In the course of arguing other questions there were some occasional generalities about "constitutional rights."[4] These were merely rhetorical flourishes, serving no purpose other than to add a literary flavor to what was essentially an argument of a question of State law. [Cf., *Bowe v. Scott*, 233 U. S. 658, 664 (1914); *Mutual Life Ins. Co. v. McGrew*, *supra*, 188 U. S. at 311. See, Point I, B, *infra*, pp. 34-37.]

5. The District Court of Appeal affirmed the judgment of dismissal upon the sole ground that it did not appear from the complaint that the alleged exclusion of petitioners from employment in the motion picture industry was the result of the monopolistic and discriminatory combination among the defendants averred; so, it did not appear that petitioners have been injured or damaged by that combination; therefore they had no cause of action

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[4]The references in this connection upon which petitioners rely are collected at pages 12-13 of their brief here. Examination of them in the context in which they appeared below will bear out the characterization of them made in the footnoted text above. [See, Point I, B, *infra*, pp. 34-37.]

for any relief in respect of it.[5] [R. 69-77] There was no discussion in the opinion of the court of any federal right or of the federal constitution or any law passed in pursuance of it. No federal question of any kind was touched upon or decided in the opinion of the appellate court.[6] [R. 63-78.] Petitioners themselves say the holding was that they "had no standing to sue . . ." [Br. 87.]

6. A petition for rehearing in the District Court of Appeal was filed. In it, in addition to various non-federal grounds, petitioners made the contention that the Court's decision adverse to petitioners "merely because appellants [petitioners here] have not alleged the existence or probability of a contract of employment" denied them equal protection and due process "in violation of the equal protection and due process provisions of the fourteenth amendment." [*Pet. for Rehear.*, 10-13] This ground of the petition was opposed by respondents on the merits and, as well, because it came too late to be

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[5]In California a judgment based on the sustaining of a demurrer to the complaint will be affirmed if the demurrer was good on any ground made, regardless of the ground upon which the trial court may have sustained it. [*Moxley v. Title Ins. & Tr. Co.*, 27 Cal. 2d 457, 462, 165 P. 2d 15, 17 (1946).] It may also be noted that in California practice the memorandum opinion of a trial court cannot be used on appeal to impeach or vary its findings or judgment. [*De Cou v. Howell*, 190 Cal. 741, 751, 214 Pac. 444, 448 (1923); *Goldner v. Spencer*, 163 Cal. 317, 320, 125 Pac. 347, 348 (1912); *Williams v. Kinsey*, 74 Cal. App. 2d 583, 600, 601, 169 P. 2d 487, 498-499 (1946); *Lord v. Katz*, 54 Cal. App. 2d 363, 367, 128 P. 2d 907, 909 (1942).]

[6]This reinforces the conclusion that no such question was raised below. [*Bowe v. Scott, supra*, 233 U. S. at 664; *Bachtel v. Wilson*, 204 U. S. 36, 40 (1907).]

considered.[7] [*Answer to Petition for Rehear.*, 4-5] The order of the District Court of Appeal was: "Petition for rehearing denied." [R. 78] Such an order, in the circumstances here involved, cannot be taken as a decision of the federal question.[8]

7. A petition for hearing in the State Supreme Court after decision by the District Court of Appeal was next filed. Among a large number of other grounds for a hearing it was argued, under the heading "The Decision Below Creates An Unreasonable Classification," that due process and equal protection had been denied; but without explicit statement whether the asserted denial arose under the State or the United States constitution.[9] [*Pet. for Hear.*, 37-40.] The opposition to the petition was grounded, among others, upon the proposition that the fed-

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[7]A contention advanced for the first time in a petition for rehearing in a California appellate court comes too late to require consideration or decision of it by the court. That is a "settled rule" of practice in that State. [*Prince v. Hill*, 170 Cal. 192, 195, 149 Pac. 578, 580 (1915); *A. F. Estabrook Co. v. Ind. Acc. Comm.*, 177 Cal. 767, 771, 177 Pac. 848, 849 (1918); *Sanders v. Howard Park Co.*, 86 Cal. App. 2d 721, 723, 195 P. 2d 898, 899 (1948).] Neither will a contention not made in the trial court be considered on appeal. [*Imperial Valley E. Co. v. Globe Grain etc. Co.*, 187 Cal. 352, 359, 202 Pac. 129, 131-132 (1921); *Herbert v. Lankershim*, 9 Cal. 2d 409, 484, 71 P. 2d 220, 257 (1937); *Mutual Life Ins. Co. v. McGrew*, 188 U. S. *supra*, at 309, and California cases there cited.]

[8]That order might have been based upon the untimeliness of the contention under the State practice, or upon the failure to make it in the trial court. This in itself would be an adequate state ground for the result in the State appellate court. [Point I, B, *infra*, pp. 30-37.]

[9]A contention of unconstitutional action which, as stated by the party making it, may be referrable to either the State or the federal constitution is insufficient. [*Oxley Stave Co. v. Butler County*, 166 U. S. 648 (1897); *Bowe v. Scott*, *supra*, 233 U. S. at 665; *New York ex rel. Bryant v. Zimmerman*, 278 U. S. 63, 67-68 (1928).]

eral question was raised too late. [*Ans. to Pet. for Hearing in 2d Civ. No. 20769,* 11-12.] The Supreme Court order was: "Appellants' petition for hearing Denied. Carter, J. is of the opinion that the petition should be granted." [R. 79.]

8. The record thus affirmatively shows:

a. None of the federal questions which petitioners now seek to have reviewed was raised or decided in the State court of first instance.

b. None of them was raised, and, even if raised, none of them was decided in the State District Court of Appeal when the cause was heard on the merits. Determination of them was not necessary to the decision actually made.

c. When raised in the petition for rehearing they did not embrace any question going beyond the equal protection or due process clauses of the Fourteenth Amendment.[10] [Pet. for Rehear., 10-13]

The record fails to show that, after the federal questions were belatedly raised, any one of the State courts involved entertained or decided them.

Restatement of Questions Presented.

1. Does this Court have jurisdiction to review a State court judgment when (a) that judgment rests on an independent non-federal ground adequate to support it, i.e., the absence of any showing of injury to the

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[10]There was not the slightest suggestion of any question under the privileges and immunities clause of the Fourteenth Amendment; or under the due process clause of the Fifth Amendment; or under the First Amendment; or under the supremacy clause, Article VI, clause 2.; Yet, questions directly involving all of these provisions are now argued at length in petitioners' brief.

petitioners from the allegedly wrongful conduct complained of; and, (b) the federal question sought to be reviewed was not raised or decided in the trial court, was not clearly or properly raised on appeal until the filing of a petition for rehearing in the State appellate court, and the record here does not show that the question was entertained or decided by that Court?

2. In an action for unjustified interference with business or employment relations, based upon an alleged agreement among all employers in a particular industry not to employ persons who invoked the self-incrimination privilege when questioned as witnesses before a committee of the Congress, the State court held that the plaintiffs had failed to show that their alleged inability to obtain employment in that industry was brought about by that agreement, so that their complaint failed to state a cause of action for any relief in respect of the employers' agreement. That holding was not based upon any statute of the State, or upon any determination that the agreement was lawful or constitutional, but upon the common law doctrine of interference with business relations. On these facts, did the *State* deprive the plaintiffs of property without due process of law or deny them equal protection of the laws within the meaning of the Fourteenth Amendment to the constitution of the United States?

3. When the only constitutional question presented in the petition for certiorari dealt solely with alleged rights under the due process and equal protection clauses of the Fourteenth Amendment and the supremacy clause, will this Court entertain and decide questions, raised in the petitioners' brief on the merits, arising under other provisions of the constitution?

Statement of the Case.

A. The Complaint.

1. The case was decided in the trial court on a demurrer to the amended complaint. It is, therefore, of the first importance that we know precisely what the well-pleaded facts in it were; and that we also know essential facts not pleaded.[11] Taking the first count relating to petitioner Wilson as typical of the other counts [R. 38] the complaint made these material allegations:

a. Petitioner is by profession a motion picture writer with more than five years experience as such. He has acquired a reputation for excellence of work and has won high esteem as such a writer. [R. 29]

b. The corporate respondents, except for certain trade associations formed by them, are in the business of producing and distributing motion pictures. They and the individual respondents (other than the so-called committee respondents) directly and indirectly control all motion picture production and distribution in the United States and all employment opportunities therein for actors, writers and others. [R. 29-34]

c. Prior to March 5, 1951 the respondents agreed with each other to refuse to employ and to exclude from employment in the motion picture industry all employees and persons seeking employment there-

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[11] In California a demurrer, like a motion to dismiss in the federal practice [*Collins v. Hardyman*, 341 U. S. 651, 652 (1951)], admits only the well-pleaded facts. It does not admit conclusional, argumentative or epithetical averments. [*Faulkner v. California Toll-Bridge Auth.*, 40 Cal. 2d 317, 328, 253 P. 2d 659, 667 (1953); *Callahan v. Broderick*, 124 Cal. 80, 82-83, 56 Pac. 782, 783 (1899); *Gosewich v. Doran*, 161 Cal. 511; 515-516, 119 Pac. 656, 658 (1911).]

in who, among other things, having been subpoenaed as witnesses before the Un-American Activities Committee of the House of Representatives refused, on constitutional grounds including the privilege against self-incrimination, to answer questions concerning their political affiliations, associations and beliefs; or who, having been named before the Committee as Communists, refused or failed to appear before the Committee and waive and surrender their constitutional rights and testify as to their political affiliations, associations and beliefs and those of their families, friends, associates and acquaintances.[12] [R. 35]

d. Respondents agreed that such persons would not be employed in the motion picture industry. Having so agreed, and intending to prevent them from being employed, respondents induced and persuaded each other, and other employers in the industry, not to employ such persons. As part of that agreement respondents have circulated and are circulating throughout the entire motion picture production, distribution and exhibition fields a list containing the names of such persons with the intent that they be not employed. [R. 35-36]

e. By this conduct the respondents "without justification or excuse have interfered with and injured the right of said employees and other persons reasonably to expect employment in the motion picture industry and to pursue their professions and oc-

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[12]The agreement was also alleged to extend to other categories of conduct; but no facts were alleged to show that any of the petitioners engaged in conduct coming within these categories. [See, R. 35]

cupations therein, and have prevented their employment therein." [R. 36]

f. On September 20, 1951 petitioner Wilson appeared before the Committee pursuant to subpoena. He there refused to answer certain questions put to him concerning his political affiliations, beliefs and associations.[13] Petitioner refused to answer those questions, "basing his refusal upon his constitutional rights, including the privilege against self-incrimination under the Fifth Amendment to the Constitution of the United States. . . . ." [R. 36]

g. As a result, and by reason of the acts and agreement of respondents, petitioner has been and is now refused and excluded from employment in the motion picture industry; and will henceforth find it impossible to obtain employment in the profession to which he has devoted a major part of his life and energy. [R. 36]

h. The purpose of the agreement of the respondents, according to the belief of petitioners, was and

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[13]In California a fact which is the subject of judicial notice may be deemed a part of a complaint, even in the face of a contrary averment. [*Weil v. Barthel*, 45 Cal. 2d 835, 837, 291 P. 2d 30, 31 (1955); *Chavez v. Times-Mirror Co.*, 185 Cal. 20, 23, 195 Pac. 666, 668 (1921); *Hammell v. Britton*, 19 Cal. 2d 72, 75, 119 P. 2d 333, 334-335 (1941).] Accordingly, the State court took judicial notice of the proceedings of the Congressional Committee and thereby noticed that the questions put to petitioner related to whether he was or ever had been a member of the Communist Party. [R. 67-68] The notice which it took was merely of the proceedings before the Committee, i.e., of what had transpired there. It did not notice, indeed it could not have taken notice, that the assertions, answers or other statements there made were true or that they were proof of the facts asserted. [See, cases cited, note 20, *infra*, p. 19.] The petitioners opposed respondents' request for judicial notice [see their Reply Brief, 42-58, in the District Court of Appeal] and made no request, on their own account, that any fact be noticed.

is to limit, control and direct the political activities of their employees and to coerce and influence them by means of threat of discharge and loss of employment to refrain from adopting or following any course or line of political action not acceptable to the Committee; to limit employment in the motion picture industry to persons whose political beliefs are acceptable to the Committee; and to limit production of motion pictures to those the content of which is acceptable to the Committee.[14] [R. 37]

i. Compensatory damages of $1,250,000.00 and punitive damages of $1,000,000.00, were alleged in general terms. [R. 37]

j. Difficulty of ascertaining damages and irreparable injury were also alleged in general and conclusional language. [R. 37-38]

2. What the complaint did not allege is at least as important as what it did.[15] It did not allege:

a. That any of the petitioners was employed in the motion picture industry at the time the alleged agreement was made by the respondents; or at the time they appeared or were named before the Committee.

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[14]We summarize these allegations because petitioners place so much emphasis on them. They were, however, little if any more than averments of the "belief" of the petitioners. They were, therefore, argumentative and conclusional within the meaning of the California decisions [see, note 11, *supra*, p. 11]; and so, were not admitted by the demurrer.

[15]The presumption below, which the District Court of Appeal indulged [R. 74-75, 76-77], was that petitioners had pleaded the strongest case open to them. [*Faulkner v. California Toll-Bridge Author., supra*, 40 Cal. 2d at 328, 253 P. 2d at 666, and cases there cited.]

b. That any of them, at the times in question, had any reasonably probable or certain prospect of being so employed; or that, but for the acts of respondents complained of, they would have been employed.

c. That any of them, at or after they appeared or were named before the Committee, had requested or sought such employment; or that negotiations therefor were pending in any of their behalfs.[16]

d. That the list allegedly being circulated contained their names; or, if it did, that any statement in it was untruthful or a misrepresentation; or that it had been circulated to anyone not making a special request for it.[17]

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[16]At oral argument in the State appellate court it was conceded that "'it was not alleged 'that individual plaintiffs did apply for work and were denied the right to work.'" [R. 75]

[17]California has a so-called "blacklisting" statute. It is as follows [*Cal. Labor Code*, secs. 1050, 1053]:

§1050. Any person, or agent or officer thereof, who, after having discharged an employee from the service of such person or after having paid off an employee voluntarily leaving such service, by any misrepresentation prevents or attempts to prevent the former employee from obtaining employment, is guilty of a misdemeanor.

* * *

§1053. Nothing in this chapter shall prevent an employer or an agent, employee, superintendent or manager thereof from furnishing, upon special request therefor, a truthful statement concerning the reason for the discharge of an employee or why an employee voluntarily left the service of the employer. If such statement, furnishes any mark, sign, or other means conveying information different from that expressed by words therein, such fact, or the fact that such statement or other means of furnishing information was given without a special request therefor is *prima facie* evidence of a violation of sections 1050 to 1053.

B. The Decision of the State Courts.

1. In the trial court, respondent's demurrer to the amended complaint was sustained without leave to amend. [R. 55, 56] The court's order in that regard was accompanied by a memorandum opinion [see, note 5, *supra*, p. 6] in which there was discussed only the question whether the respondents' alleged interference with petitioners' employment relations was shown to have been unprivileged or unjustified. No question arising under the Fourteenth Amendment was suggested, discussed or decided. [R. 44-54] Pursuant to that ruling, and some three weeks after it had been made, a judgment of dismissal was entered. [R. 55-56]

2. The District Court of Appeal affirmed the judgment. [R. 78] It did so on the sole ground that there was "an entire absence of factual allegation showing that any legally protected interest of plaintiffs has been interfered with. Neither an existing nor a prospective contract or business relationship is alleged. And there is nothing in the pleading from which it may be inferred that any prospective contract or business relationship has been interfered with by any wrongful acts of the defendants . . ." [R. 75-76] The steps in the Court's reasoning by which it arrived at that conclusion were these:

a. It was assumed that petitioners had stated their case as strongly as it was possible for them to do so. [R. 76]

b. The cause of action attempted to be alleged was "obviously one for wrongful interference with

future or prospective contract or business relations . . ."[13] [R. 69].

c. It was the general rule that to recover "for interference with the loss of a future or prospective contract or business relationship, it must appear that such contract or relationship would otherwise have been entered into . . ." [R. 70]

d. The complaint was devoid of any allegation of fact that any contract or relationship would have been entered into between any one of the petitioners and anyone in the motion picture industry but for the alleged agreement of the respondents. Reference was made to the matters which were not alleged, along lines to which we have already referred, *supra*, pages 13-14. From this absence of allegation, and from the fact that at most the complaint showed an employment and a termination of it some years before the respondents' agreement, the inference "necessarily is that the termination was the result of facts wholly disconnected from the agreement and that those facts, whatever they may have been, still are effective . . ." [R. 75]

e. It could not be inferred from the complaint that petitioners "have not obtained employment since they invoked their constitutional privilege solely because of that fact." [R. 75]

f. Consequently, there was an absence of factual allegation showing that any legally protected interest of petitioners had been interfered with by any

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[13]By making that statement the Court agreed with petitioners' own characterization of the nature of their complaint, as stated by them at page 1 of their Opening Brief in that Court

wrongful act of the respondents. The complaint, therefore, did not state a cause of action. [R. 75-76]

g. In view of this conclusion the Court did "not reach other points argued by counsel." [R. 77]

3. It is quite clear from the opinion of the District Court of Appeal that it did not reach, discuss or decide any question arising or thought to arise under the Fourteenth Amendment or any other provision of the federal constitution. It is also clear that the Court did not decide whether respondents alleged wrongful agreement was or was not unlawful, either under State law or by virtue of any provision of the constitution or laws of the United States. There was no occasion to decide any such question, assuming it to have been raised, since the Court had held that no legally protectible interest of the petitioners had been interfered with by that agreement.[19] [R. 77]

4. The proceedings in connection with petitioners' petition for rehearing and for a hearing in the State Supreme Court have already been adequately summarized. [Jurisdiction, *supra*, pp. 6-8.]

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[19]The District Court of Appeal did take judicial notice "of the proceedings and reports of the Committee on Un-American Activities"; and concluded that the questions put to petitioners by that Committee at the times alleged in the complaint did not relate to their political affiliations, associations or beliefs but concerned "their membership in a 'conspiratorial and revolutionary junta' . . ." [R. 67-68] Nothing in the decision of the Court, as petitioners now concede [Br. 13-14, 88-89], was made to depend on the matter so noticed. That *dictum* or statement in the opinion presents nothing for review. This Court reviews decisions, not statements in an opinion. [*Black v. Cutter Laboratories*, 351 U. S. 292, 297-298 (1956).]

C. Some Deficiencies in Petitioners' Statement of the Case.

Attention should be called to certain significant omissions from and unwarranted additions to the matters appearing in the record which have been made in Petitioners' "Statement of the Case." [Br., 3, *et seq.*] For example:

1. They state that the purpose of the combination complained of was to "refuse employment and to exclude from employment . . . all employees and persons seeking employment . . ." [Br. 4] They do not call attention to the fact that there was no allegation that any of them was, at the times here material, an "employee" or a "person seeking employment." As has been seen, it was the absence of any such allegation which largely influenced the result below. [Statement of the Case, *supra*, pp. 15-17.]

2. They do not refer to or summarize the allegation by which they characterized the nature or basis of their supposed cause of action. That allegation was this [R. 36]:

> ". . . That the defendants and each of them by this conduct wrongfully, maliciously and without jurisdiction or excuse have interfered with and injured the right of said employees and other persons reasonably to expect employment in the motion picture industry and to pursue their professions and occupations therein, and have prevented their employment therein."

3. The activities and proceedings of the House Committee on Un-American Activities which preceded or

followed the hearing at which petitioners appeared [Br. 7-10] were not noticed by any of the courts below; and no request that they be judicially noticed was ever made. The only notice taken—and this was opposed by petitioners, who argued that judicial notice did not extend so far [Reply Br. in the District Court of Appeal, 50-52]—was of the proceedings of the Committee, insofar as they related directly to the petitioners, at the time or times alleged in the complaint. [R. 36 (par. VI), 67-69]

4. The personal data with respect to the award-winning activities and the employment record of some of the petitioners [Br. 9-10; Br., App., 65-72] were not judicially noticed below. They could not have been except upon the premise that testimony or statements before the Committee established the truth of the matters there asserted without any right in the respondents to meet with other evidence.

5. The statement contained in the footnote at page 9 of Petitioners' Brief with respect to loss of employment is not supported by any reference to the record, or for that matter, to anything outside the record. It is patently a matter not the subject of judicial notice but one requiring allegation and proof in any case in which the fact may be relevant and material to some issue.[20]

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[20]With respect to the limits of judicial notice, see: *Mutual L. Ins. Co. v. McGrew*, *supra*, 188 U. S. at 312; *Arkansas v. Kansas & Texas Coal Co.*, 183 U. S. 185, 189, 190 (1901); *Weitzenkorn v. Lesser*, 40 Cal. 2d 778, 787-788, 256 P. 2d 947, 954-955 (1953); *Popcorn Equipment Co. v. Page*, 92 Cal. App. 2d 448, 452-454, 201 P. 2d 647, 650-651 (1949).

Summary of the Argument.

Decision below was expressly and squarely based on only one ground. That was that the complaint failed to state a cause of action for tortious interference with business or employment relations because it was not alleged that, at the times of the alleged wrongful conduct of respondents, any of the petitioners were employed or seeking employment or that any of them had a reasonably certain prospect of obtaining employment in the motion picture industry. Rather, it appeared from the complaint that any loss of employment or failure to obtain it by petitioners was the result of causes other than the conduct complained of. Consequently, it did not appear that any legally protectible interest of petitioners had been invaded by that conduct. This was an independent non-federal ground, adequate to sustain the judgment. This Court, therefore, is without jurisdiction to determine the federal questions now sought to be raised. [Point I, A, *infra*, pp. 23-30.]

Another independent and adequate non-federal ground arises from the failure of petitioners to make their claim of federal right in the trial court at all, and from their failure to make it seasonably in the District Court of Appeal. California's practice requires that questions sought to be reviewed on appeal must have been raised in the trial court; and, also, that they cannot in any event be raised for the first time on appeal in a petition for rehearing. No state court in this case entertained or decided any of the federal questions now presented by

petitioners. The record here does not show that this absence of decision was not based on the State's procedural requirements just referred to. Furthermore, in the view of the case taken by the District Court of Appeal and upon which it grounded its decision, it was not necessary to reach or decide any of the federal questions, even assuming that they were seasonably and properly raised. [Point I, B, *infra*, pp. 30-37.]

Decision of a question of state law—and that is all that was decided below—raises no question of due process or equal protection. The Fourteenth Amendment does not guarantee that state court decisions of local law will be either correct or uniform. In any event, since the Fourteenth Amendment does not fasten upon the states any particular social or economic philosophy, the State here was free, so far as substantive due process was concerned, to adopt, alter or modify the common law doctrine of interference with business relations as it saw fit. It was also free, so far as equal protection was concerned, to classify upon the basis of differences between the classes reasonably related to the subject matter and purpose of the rule of law concerned. Differentiation, for purposes of applying the doctrine of interference with business relations, between those who do and those who do not have an existing or reasonable prospective business relationship, is entirely reasonable and proper. [Point I, C, *infra*, pp. 37-40.]

If it be assumed that questions under the due process and equal protection clauses are properly before this Court,

and if it be further assumed that it was necessarily decided below that the alleged combination or agreement of respondents was lawful, there is still no case for application of the Fourteenth Amendment. The provisions of that Amendment are restrictions upon the State, not upon private conduct or private agreements voluntarily made and voluntarily adhered to. When the State has not exerted its power to enforce or compel adherence to such private agreements, when all that it has done is to say, speaking through its courts, that a private agreement or some course of private conduct is not prohibited by any positive law or rule, there has not been such "State action" as is necessary to bring the Fourteenth Amendment into play. That is so because the opposite view would, in effect, make all private conduct which the State does not affirmatively prohibit subject to Fourteenth Amendment standards. Such a view would run counter to every decision of this Court on the subject. It would radically change the present balance between State and Federal jurisdiction in the regulation and control of private and local activities. It would make of the nation a centralized rather than a federal policy. It would, in short, completely change the fundamental structure and nature of the Union. [Point II, *infra*, pp. 40-52.]

The other federal questions argued by petitioner are not properly cognizable. They were not raised or decided below at any time. They are not within the scope of the questions presented in the petition for writ of certiorari. Either as a matter of want of jurisdiction or of non-conformity to this Court's practice, they should not be considered. [Point III, *infra*, pp. 52-55.]

ARGUMENT.

I.

This Court Is Without Jurisdiction Because the Judgment Is Based on Independent Non-federal Grounds Adequate to Sustain It.

There are in this case two independent non-federal grounds, either of which is adequate to sustain the judgment sought to be reviewed. The first of these is that judgment went against petitioners because, as a matter of state tort law and without regard to whether the combination or agreement of respondents was or was not in any way unlawful or unconstitutional, there had been no showing that the injury complained of resulted from or was brought about by that allegedly wrongful conduct. [Statement of the Case, *supra*, pp. 15-17.] The second is that the questions now asserted were not decided below because they had not been raised at such time and in such manner as, under the state practice, required the state courts to entertain or decide them. [Jurisdiction, *supra*, pp. 3-8.]

We know with complete certainty that the decision of the District Court of Appeal—properly the court to which certiorari was directed [*Hammerstein v. Superior Court*, 341 U. S. 491, 492 (1951).]—was expressly based on the first of these non-federal questions. [Statement of the Case, *supra*, pp. 15-17.] We know too that under the state practice the decision might have been based on the second of these questions [Jurisdiction, *supra*, pp. 3-8]; and we cannot tell from the record that it was *not* so based. Because of this explicit showing, and also because of the absence of any negation in the record of the possibility that the questions were not

decided because of the time and manner of their presentation below, the conclusion follows that this Court is without jurisdiction to decide them on their merits, whatever their appeal may be. [*Edelman v. California*, 344 U. S. 357, 358-359, 361-362 (1953).]

It has long been the rule of this Court—adhered to, it has been said, since the Court's foundation [*Herb v. Pitcairn*, 324 U. S. 117, 125 (1945)]—that "it will not review judgments of state courts that rest on adequate and independent state grounds . . ." [*Idem.* Other cases to this effect are cited in the margin.[21]] That rule applies even when, unlike the instant case, the state court in fact decided the federal question—for, to give this Court jurisdiction the federal question must have been *necessarily* decided. [*De Sassure v. Gaillard*, 127 U. S. 216, 232 (1888); *Lynch v. New York ex rel. Pierson*, 293 U. S. 52, 54-55 (1934); *Rogers v. Jones*, 214 U. S. 196, 204 (1909); *Honeyman v. Hanan*, 300 U. S. 14, 18 (1937). See, *Williams v. Kaiser*, 323 U. S. 471, 477, 480 (1945); *Black v. Cutter Laboratories*, 351 U. S. 292, 298-299 (1956).]

And where the record is ambiguous or silent so that it is impossible to tell whether the judgment rests on the federal or the non-federal ground, it is enough to deprive this Court of jurisdiction that the judgment *might* have rested on the non-federal ground. Jurisdiction must be

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[21] *Woods v. Nierstheimer*, 328 U. S. 211, 214, 216 (1946); *White v. Ragen*, 324 U. S. 760, 766-767 (1945); *Enterprise Irrig. Dist. v. Farmers Mut. Canal Co.*, 243 U. S. 157, 164 (1917); *Holley v. Lawrence*, 317 U. S. 518 (1943); *New York ex rel. Doyle v. Atwell*, 261 U. S. 590, 592 (1923); *Cuyahoga Power Co. v. Northern Realty Co.*, 244 U. S. 300, 303 (1917); *Fox Film Corp. v. Muller*, 296 U. S. 207, 210 (1935).

shown affirmatively; it cannot rest in conjecture or debatable inference.[22] [*Stembridge v. Georgia*, 343 U. S. 541, 547-548 (1952); *Durley v. Mayo*, 351 U. S. 277, 281, 284-285 (1956); *Phyle v. Duffy*, 334 U. S. 431, 444 (1948); *Ellis v. Dixon*, 349 U. S. 458, 460 (1955); *Allen v. Arguimbau*, 198 U. S. 149, 154-155 (1905); *Walter A. Wood Co. v. Skinner*, 139 U. S. 293, 297 (1891); *Johnson v. Risk*, 137 U. S. 300, 307 (1890); *American Ry. Express Co. v. Kentucky*, 273 U. S. 269, 272 (1927).

Application of these well established principles to the facts at bar leads clearly to the conclusion that this Court is without jurisdiction.

A. The State Court Expressly Based Its Judgment on the Proposition That Even if the Conduct Complained of Was Unlawful Petitioners Were Entitled to No Relief in Respect of It Because It Had Not Injured Them. That Was a Non-Federal Ground, Fully Sustaining the Judgment and Independent of Any Federal Ground Going to Establish the Unlawfulness of the Conduct.

First: As has been seen, the explicit ground upon which the decision of the District Court of Appeal was rested concerned only a local question of tort law. Petitioners were denied relief—not because the combination or agreement of which they complained was held by that Court to be lawful or constitutional—but because they had failed to show that the combination, whatever its nature,

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[22]Compare, *Carroll v. United States*, 354 U. S. 394, 399 (1957), in which it was said:

> "It is axiomatic, as a matter of history as well as doctrine, that the existence of appellate jurisdiction in a specific federal court over a given type of case is dependent upon authority expressly conferred by statute.

had so impinged upon any legally protectible interest of theirs as to have caused them any injury or damage. In short, the causal connection between the alleged harm to them, that is, loss of or failure to obtain employment, and the wrongful conduct complained of, was not shown. [Statement of the Case, *supra*, pp. 15-17.]

Plainly enough this was the decision of a question of state law. [*Cf., Fairport, P. & E. R. Co. v. Meredith*, 292 U. S. 589, 597-598 (1934); *Neblett v. Carpenter*, 305 U. S. 297, 302 (1938); *Parker v. McLain*, 237 U. S. 469, 472-473 (1915); *Sherman v. Grinnell*, 144 U. S. 198, 201-202 (1892).] As such it is beyond the power of this Court to review. [*American Ry. Express Co. v. Kentucky, supra*, 273 U. S. at 272-273; *Black v. Cutter Laboratories, supra*, 351 U. S. at 298. *Cf., Erie R. Co. v. Tompkins*, 304 U. S. 64, 78-80 (1938); *Ragan v. Merchants Transfer & W. Co.*, 337 U. S. 530, 533 (1949). See, also, cases cited, *supra*, p. 24.]

Just as plainly, it was a ground of decision broad enough to sustain the judgment of dismissal. It was also one which did not require, for its determination, decision of any federal question. Even if the alleged conduct of respondents were unlawful or unconstitutional in all of the respects now claimed by petitioners, decision of the issue of causal connection could have been no different. It would still have been true that respondents' conduct, *ex hypothesi* unlawful and unconstitutional, inflicted no harm upon the petitioners; as a consequence *they* had no civil cause of action in respect of it. Thus the non-federal ground is seen to be broad enough to sustain the judgment; and, as well, to be independent of any federal question. Any decision of the federal questions, even

if they had been decided, would not have been in any way necessary to the determination of state law which was made.

Necessarily, then, the principles governing this Court's jurisdiction [Point I, *supra*, pp. 23-25] apply here to establish want of jurisdiction to hear or decide the instant cause on the merits.

Second: That is so regardless of the correctness or incorrectness of the State court's decision as a matter of local law. ". . . whatever the grounds of that decision it is binding on [this Court] insofar as state law is concerned . . ." [*Williams v. Kaiser, supra,* 323 U. S. at 473.[23]]

On occasion the suggestion has been made that if decision of a state question is palpably so arbitrary or unfounded as to stamp it merely a device to evade federal review, determination of federal questions otherwise properly presented will not be forestalled. [See *e. g., Enterprise Irrig. Dist. v. Farmers Mut. Canal Co., supra,* 243 U. S. at 164; *McCoy v. Shaw,* 277 U. S. 302, 303 (1928).] But that is a far different thing from review of a decision of a State court merely for the sake of revising the State court's judgment on a qeustion of State law. An adequate and independent non-federal ground, even though decided contrary to this Court's view of the correct decision on the subject, negates federal jurisdiction [See, *Bachtel v. Wilson,* 204 U. S.

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[23] To the same effect: *Smith v. O'Grady,* 312 U. S. 329, 330 (1941); *Neblett v. Carpenter, supra,* 305 U. S. at 302; *Bi-Metallic Inv. Co. v. Colorado,* 239 U. S. 441, 444 (1915); *Black v. Cutter Laboratories, supra,* 351 U. S. at 298, 299; *Radio Station WOW, Inc. v. Johnson,* 326 U. S. 120, 129 (1945).

36, 40 (1907); *Delmar Jockey Club v. Missouri*, 210 U. S. 324, 335 (1908); *Radio Station WOW, Inc. v. Johnson, supra*, 326 U. S. at 129; *Klinger v. Missouri*, 13 Wall. 257, 263 (1871).]

In any event, the decision with which we are here concerned cannot properly be characterized as palpably arbitrary or unfounded. It was based upon a principle of the law of interference with business relations which had been previously announced and applied in California [*Campbell v. Reyburn*, 129 Cal. App. 2d 232, 234-235, 276 P. 2d 671, 672 (1954)]; and which had been followed in a number of other jurisdictions as well. [R. 70-74. The cases are collected in *Annotation* 9 A. L. R. 2d 228, 256-257. None to the contrary is cited there or by petitioners.] To be sure, no previous case involved a precisely similar factual situation. But, having regard to the case-law method of jurisdictions inheriting the common law tradition, it cannot be said that a court acts arbitrarily or without basis when it applies to a new set of facts the logically pertinent principle of an earlier decision. [Cf. *Wood v. Brady*, 150 U. S. 18, 22-23 (1893); *American Ry. Express Co. v. Kentucky, supra*, 273 U. S. at 273.]

The decision, too, is obviously consistent with a general principle that runs throughout the law—that wrong and injury must combine; so that the former without the latter creates no cause of action. [*Whipley v. McKune*, 12 Cal. 352, 357-358 (1859); *Atkins v. Gamble*, 42 Cal. 86, 106 (1871). Generally see, *Restatement of the Law, Torts*, (Amer. Law Instit. 1934), secs. 7, 848(c); Holmes, *Privilege, Malice and Intent*, 8 Harvard Law Rev. at 1 (1894)] Courts sit to determine concrete cases

and controversies, not abstract questions of law. To invoke the judicial power one must show that he has sustained or is in danger of sustaining immediately some direct injury as the result of the wrong complained of. [See, *Massachusetts v. Mellon*, 262 U. S. 477, 488 (1923); *Fairchild v. Hughes*, 258 U. S. 126, 129-130 (1922).] So, one not adversely affected in some recognized temporal interest by an alleged wrong is not usually in a position to bring about an adjudication of the question whether there has been in fact any wrong. [See, *MacLeod v. Fox West Coast T. Corp.*, 10 Cal. 2d 383, 386, 74 P. 2d 276, 278 (1937); *Stryker v. Republic Pictures Corp.*, 108 Cal. App. 2d 191, 195, 238 P. 2d 670, 672 (1951); *Gillette v. Gillette*, 122 Cal. App. 640, 643, 10 P. 2d 760, 761 (1932).]

In this regard, the decision below is fairly analogous to the proposition that one not affected by state action claimed to be unconstitutional, cannot raise the question of its constitutionality; or, put somewhat differently, one may not ordinarily invoke or assert the constitutional rights of another. That doctrine is firmly imbedded in the decisions of this Court. [*Tileston v. Ullman*, 318 U. S. 44, 46 (1943) and cases there cited; *McCabe v. A. T. & S. F. Ry. Co.*, 235 U. S. 151, 162-164 (1914); *Liberty Warehouse Co. v. Burley T. G. Co-op. M. Assoc.*, 276 U. S. 71, 88 (1928).]

Disposition of the instant case in the court below on a theory consistent with general principles so widely recognized in the law can hardly be characterized as arbitrary or groundless, or as merely a device to evade decision of a federal question. [*Cf., White v. Ragen, supra*, 324 U. S. at 766; *Johnson v. Risk, supra*, 137 U. S. at 307-

309; *Allen v. Arguimbau, supra,* 198 U. S. at 155; *American Ry. Express Co. v. Kentucky, supra,* 273 U. S. at 273.]

B. The Failure to Raise the Federal Questions Below Seasonably and in Proper Form Is in Itself an Adequate Non-Federal Ground.

Well settled is the proposition that petitioners' "rights under the Federal Constitution must be pursued according to the procedural requirements" of the State and this Court is "bound by the record on which [the State] judgment was based . . ." [*Hedgebeth v. North Carolina,* 334 U. S. 806, 807 (1948).] Failure to decide a federal question because it was not properly presented in accordance with the State's procedural requirements is itself an adequate and independent non-federal ground for the judgment sought to be reviewed. [*Stembridge v. Georgia, supra,* 343 U. S. at 547; *Holley v. Lawrence,* 317 U. S. 518 (1943); *Edelman v. California, supra,* 344 U. S. at 358-359; *White v. Ragen, supra,* 324 U. S. at 766-767.] Just such a non-federal ground appears in the case at bar.

First: It is a settled rule of California practice that questions not raised in the trial court will not be reviewed on appeal. Neither will questions raised for the first time in a petition for rehearing in the appellate court. [Cases cited, note 7, *supra,* p. 7.]

There is absolutely nothing in the record here to show that any federal question was raised in the trial court. [Jurisdiction, *supra,* pp. 3-5.] It is not even contended by petitioners that one was there raised. That fact, by itself, justified the State appellate courts, as a matter of local practice, in not deciding any such question, assuming it to have been otherwise properly raised in those courts.

Furthermore, in view of the conclusion reached by the District Court of Appeal on the substantive question of state law to which it devoted its opinion, it was not necessary to decide any federal question. [Point I, A, *supra*, pp. 25-26.]

In either event, there is no basis for any review of federal questions in this Court; for the reasons, first, that failure to decide because of non-compliance with the state's procedural requirements is itself an adequate non-federal ground [cases cited, *supra*, p. 30]; and, second, a federal question *necessarily* decided below is an essential predicate of this Court's jurisdiction. [Cases cited, *supra*, p. 24.]

Second: It is clear, in view of the foregoing, "that the judgment *might* have rested upon a non-federal ground . . ." [*Stembridge v. Georgia*, *supra*, 343 U. S. at 547-548 (Court's italics); *Durley v. Mayo*, *supra*, 351 U. S. at 281, 285.] That appears plainly from the opinion of the District Court of Appeal, which rested judgment on a determination of local law and for that reason did not reach any other question. [R. 77]

The order of that Court denying the petition for rehearing was a bare denial, without expression of any reason or ground. [Jurisdiction, *supra*, p. 7.] Such an order cannot be taken as a decision of some federal ground presented in the petition, especially when, as here, there is a basis for holding that that presentation was not in compliance with a procedural requirement that the contention should have been sooner made. [*Forbes v. State Council*, 216 U. S. 396, 399 (1910); *Durley v. Mayo*, *supra*, 351 U. S. at 284-285; *Bailey v. Anderson*, 326 U. S. 203, 206-207 (1945); *Mutual Life Ins. Co. v.*

McGrew, supra, 188 U. S. at 311]. Exactly the same is true, of course, of the State Supreme Court's denial of the petition for hearing in that court. [Jurisdiction, *supra,* pp. 7-8.]

Third: It cannot reasonably be contended that the federal questions now argued by petitioners could not have been raised in the trial court. Their complaint here is that their constitutional rights were invaded below by the *judgment* of the District Court of Appeal. That complaint, in turn, rests, not on anything specifically decided, but on the result itself. [Br., 15-16] In other words, the argument is that the alleged invasion was accomplished by the determination, on whatever ground, that the facts alleged did not state a cause of action.

If that is true at all, it is equally true of the *trial court's* judgment.[24] Yet not a word was said in that court which even remotely suggested the existence of a constitutional question. However confident petitioners may have been

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[24]In arguing that a question under the Fourteenth Amendment was properly raised in the District Court of Appeal petitioners refer to page 7 of their Opening Brief in that Court. [Br., 12] We assume they refer to the heading appearing on that page reading as follows: (Italics ours)

> "*The Judgments below* Sustaining the Demurrers to the Complaint and Dismissing the Action Without Trial Deprived Appellants of Their Liberties and Properties Without Due Process of Law . . ."

They could just as easily have said as much in the trial court.

It may also be noted that to the extent that this heading purports to raise any constitutional question it is one which is not now being urged by petitioners; i.e., that *procedural* due process was denied because the complaint was dismissed "Without Trial." Of course, dismissal after a demurrer has been sustained, as here, after notice and opportunity to be heard, for the reason that the facts alleged, assuming them to be true, do not show a ground for relief as a matter of law, is not a denial of due process. [See, *Iowa Cent. Ry. Co. v. Iowa,* 160 U. S. 389, 393-399 (1896); *Ownbey v. Morgan,* 256 U. S. 94, 110-112 (1921).]

of their legal position when they commenced this action, they could not blandly or blindly exclude from their thinking all possibility of an adverse result in the trial court. The uncertainties of the law and of litigation are still to be reckoned with by any lawyer not wholly inexperienced or ingenuous.

In any event, when respondents filed their first demurrer the possibility that the facts alleged by petitioners might be held not to state a cause of action was not then beyond ordinary prescience. That possibility became a reality when the demurrer was sustained. Petitioners by then must have known that unless their complaint was amended in substantial particulars, judgment in the trial court *would* go against them. They made no such amendment. So, another demurrer was sustained, this time without leave to amend. That made inevitable the entry of a judgment against them unless the ruling on the demurrer was reconsidered. [Jurisdiction, *supra*, pp. 3-5; Statement of the Case, *supra*, p. 15.]

If the contention that such a judgment would deprive petitioners of constitutional rights were ever to be made the time—and the latest permissible time—to make it had arrived. The state practice provided a method by which the contention could have been raised in the trial court even at that late date. [Jurisdiction, *supra*, pp. 4-5.] Petitioners, however, did not avail themselves of it. They permitted judgment to go in accordance with the ruling on demurrer.

Their failure in this regard cannot be excused by any claim that the judgment of the trial court could not have been anticipated. At least during the time between the ruling on the second demurrer and the actual entry of the

judgment of dismissal (a period of over three weeks [R. 55]) there was nothing which had to be anticipated; the result, absent a motion to reconsider, was an accomplished and inevitable consequence of that ruling, plainly foreseeable without possession of any gift of prophecy. [See, *Herndon v. Georgia*, 295 U. S. 441, 444-446 (1935); *Johnson v. New York Life Ins. Co.*, 187 U. S. 491, 495 (1903).[25]]

Fourth: Actually, it is fair to say that on the record before this Court there is nothing to show that the federal questions now argued by petitioners were ever raised below prior to the petition for rehearing in the District Court of Appeal. As we have seen, they were not then entertained or decided. [Jurisdiction, *supra*, pp. 5-7; Point I, B, *supra*, pp. 30-32.] When that is so, nothing is better settled than the proposition that a federal question comes too late when raised for the first time in a petition for rehearing or in an application to the State's highest court to exercise its discretionary jurisdiction to review the case. [*Consolidated Turnpike v. Norfolk etc. Ry. Co.*, 228 U. S. 326, 334 (1913); *Bowe v. Scott, supra,*

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[25]In *Herndon* the constitutional question arose out of an alleged change by the State Supreme Court in the construction of a state statute. The question was first urged on a petition for rehearing in the State Supreme Court. A majority of this Court held the question should have been sooner raised because, while a motion for new trial was pending in the trial court, the State Supreme Court had rendered a decision foreshadowing the changed statutory construction. So, the defendant was "bound to anticipate the probability of a similar ruling in his own case, and preserve his right to a review here by appropriate action on the original hearing in the court below . . . ." The case at bar is clearly a much stronger one for application of this rule. In *Johnson* it was held that a claim of impairment of the obligation of a contract, precipitated by the trial court's judgment, should have been raised "either on the motion for a new trial, or in the assignments of error filed in the Supreme Court of the State . . . ."

233 U. S. at 663; *Radio Station WOW, Inc. v. Johnson, supra,* 326 U. S. at 128; *Mergenthaler Linotype Co. v. Davis,* 251 U. S. 256, 258-259 (1919); *Herndon v. Georgia, supra,* 295 U. S. at 443; *Forbes v. State Council, supra,* 216 U. S. at 399; *Loeber v. Schroeder,* 149 U. S. 580, 585 (1893).]

Petitioners, of course, contend that they raised the questions from the beginning in their briefs in the District Court of Appeal. [Br., 10-11] To this contention there are several answers.

1. Even if raised, the questions were not decided and did not have to be decided. Jurisdiction here cannot be based upon such a state of the record. [Point I, B, *supra,* pp. 30-32.]

2. The briefs are not part of the record. A "claim of jurisdiction [cannot] be sustained by reference to briefs and statements which are not part of the record." [*Lynch v. New York, ex rel. Pierson, supra,* 293 U. S. at 54. To the same effect: *Live Oak Water Users' Assoc. v. Railroad Commission,* 269 U. S. 354, 357-358 (1926); *Harding v. Illinois,* 196 U. S. 78, 84 (1904); *Mutual Life Ins. Co. v. McGrew, supra,* 188 U. S. at 308, 311.]

3. The references in the briefs did not properly raise any question under the federal constitution, assuming the briefs to be part of the record. They were not made in support of any claim, standing on its own footing, that petitioners had been deprived by the State of California of any constitutional rights. Rather, they were advanced as reasons why the trial court had erred in holding that the burden to show want of justification or privilege for the alleged interference with business relations was on

the petitioners.[35] The District Court of Appeal, however, found it unnecessary to deal with the subject of justification at all and did not do so. [R. 77.] Accordingly, the arguments pro and con touching that subject—(and these made up the bulk of the briefs on both sides in the District Court of Appeal)—were not considered. Furthermore, a good many of the references in petitioners' briefs were of such generality and imprecision as not to amount to a tender of any *federal* constitutional issue in a form

[35]Thus, petitioners argued that the alleged combination could not be held *prima facie* privileged or justified; that the complaint sufficiently alleged want of justification anyway; and that the trial court had erred in dismissing their complaint without a trial on the facts going to this question. [Op. Br., 7, 21. (All references in this footnote are to the briefs filed by petitioners in the District Court of Appeal).] In support of that proposition they argued: Respondents' "monopolistic control of employment opportunities in the industry runs counter to the letter and spirit of state and federal laws . . . 18 U.S.C., Secs. 1, 2 [*sic*]. . . ." [Op. Br., 15]; that "it cannot be denied that the right to earn a living ranks high in our constitutional system. (Cal. Const. Art. I, Secs. 1, 13; U. S. Const. Amend. 14) . . ." so that "it cannot be reasonably argued . . . that the burden to prove lack of justification, if there was such a burden, was not met by the appellants here. The immunity granted to the respondents by the Court below operated to deprive appellants of their fundamental right to a trial of issues palpably requiring determination" [Op. Br., 18, 21]; that there was no power in a private combination to assume the powers of government and even government would not have power to compel waiver of constitutional rights as a condition of employment [Op. Br., 21-28]; the interest of respondents thought to provide the justification for their conduct was not as important as the constitutional privilege against self-incrimination [Op. Br., 28-32]; and respondents' purpose to control the political activities of their employees ran "counter to the letter and spirit of constitutional provisions which even governmental officials are forbidden to infringe . . ." [Op. Br., 36-42] They also argued that *respondents'* claim that they had a right to control the content of their own motion pictures as a matter of their right of free speech, was a strange perversion of the First Amendment. [Reply Br., 57-58]

adequate to require a court to take cognizance of it."[27] [*Cf., Thomas v. Iowa*, 209 U. S. 258, 263 (1908); *New York ex rel. Bryant v. Zimmerman*, 278 U. S. 63, 67-68 (1928); *Ellis v. Dixon*, 349 U. S. 458, 462 (1955).]

C. No Federal Constitutional Question Arises From a Decision of State Law by a State Court Made in Accordance With Its Established Procedure.

First: No question under the Fourteenth Amendment arises from the ground upon which this case was decided below, even if we assume that this non-federal ground of decision was wholly erroneous. That decision was made, after notice and opportunity to petitioners to to be heard, in accordance with the State's ordinary and regular procedure. The "Fourteenth Amendment did not impair the authority of the States, by their judicial tribunals, and according to their settled usages and established modes of procedure, to determine finally, for the parties before it, controverted questions . . . which did not involve any right secured by the Federal Constitution . . ." [*Tracy v. Ginzberg*, 205 U. S. 170, 178 (1907).] The opposite view would make every judgment of a state court reviewable here, which, as Mr. Justice Holmes said in the case just cited, would be "a result

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[27]For example: (All references are to petitioners' briefs in the District Court of Appeal): ". . . Respondents do not deny that the right to earn a living is a liberty protected by the Constitution . . ." [Reply Br., 37]; ". . . this would not mean that such artists had not been deprived of their right to earn a living by the coercive conduct of respondents." [Reply Br., 38]; ". . . monopolistic control of employment opportunities . . . runs counter to the letter and spirit of state and federal laws . . ." [Op. Br., 15]; ". . . the right to earn a living ranks high in our constitutional system. (. . . U. S. Const. Amend. 14) . . ." [Op. Br., 18]

not to be thought of . . ." [*Tracy v. Ginzberg, supra*, 205 U. S. at 178. To the same effect: *Gryger v. Burke*, 334 U. S. 728, 731 (1948).]

As a consequence, it is settled that a state court decision made in the regular course of judicial proceedings and based on state law does not deprive the losing party of due process or deny him equal protection; and that is so even if the decision is erroneous or inconsistent with earlier state decisions. [*Worcester County Tr. Co. v. Riley*, 302 U. S. 292, 299 (1937); *Milwaukee Electric Ry. Co. v. Milwaukee*, 252 U. S. 100, 106 (1920); *Central Land Co. v. Laidley*, 159 U. S. 103, 110-112 (1895); *Arrowsmith v. Harmoning*, 118 U. S. 194, 195-196 (1886); *Iowa Central Ry. Co. v. Iowa*, 160 U. S. 389, 393, 394 (1896); *American Ry. Express Co. v. Kentucky, supra*, 273 U. S. at 273; *Enterprise Irrig. Dist. v. Farmers Mut. Canal Co., supra*, 243 U. S. at 166.]

Petitioners devote considerable space to arguing that the decision below was erroneous as a matter of state law. [Br. 25-31, 42-45, 93-106.] As the cases just cited amply show, such an argument presents nothing of which this Court may properly take cognizance.

Second: Even if the argument is cognizable here, it presents no substantial federal question. Certainly nothing in the Fourteenth Amendment *compels* a State either to recognize or to reject the common law doctrine of interference with business relations; or, having recognized it, to limit or expand it in any way. [*Cf., Ownbey v. Morgan*, 256 U. S. 94, 112 (1921).] In this regard, as in most others, the State is free to "alter, amend, or abolish the common law within its jurisdiction . . ." [*Liberty Warehouse Co. v. Burley T. G. Co-op. M.*

Assoc., supra, 276 U. S. at 89. To the same effect: *Silver v. Silver*, 280 U. S. 117, 122 (1929); *New York Cent. R. R. Co. v. White*, 243 U. S. 188, 198-200, 206 (1917); *Wilmington Min. Co. v. Fulton*, 205 U. S. 60, 74 (1907); *Munn v. Illinois*, 94 U. S. 113, 134 (1876).]

So, too, the State is "free to adopt whatever economic policy may reasonably be deemed to promote public welfare . . ." [*Nebbia v. New York*, 291 U. S. 502, 537 (1934).] It cannot be assumed that, when this Court rejected what it called the "Lochner-Coppage-Adkins" philosophy [*Day-Brite Lighting v. Missouri*, 342 U. S. 421, 423], it did no more than to substitute the straitjacket of one economic philosophy for another. If, therefore, the State of California chooses to say that it will recognize a cause of action for interference with business relations but only as to those who have suffered interference in respect of an existing or reasonably prospective relation, there is nothing in the due process clause to stand in its way. [*Cf., Arizona Employers' Liability Cases*, 250 U. S. 400, 419-422 (1919).]

By the same token, there is nothing in the equal protection clause to proscribe such a policy. Equal protection of the laws is not denied by a classification based upon differences between the classes having a reasonable relation to the subject matter and purpose of the rule. (*Jones v. Union Guano Co.*, 264 U. S. 171, 181 (1924); *New York R. T. Co. v. New York*, 303 U. S. 573, 578 (1938); *Goesart v. Clearly*, 335 U. S. 464 (1948); *Railway Express Agency v. New York*, 336 U. S. 106 (1949).]

Here, the differences between the classes defined by the decision of the District Court of Appeal are apparent, pertinent and reasonable. On the one hand are those who

have an existing or reasonably prospective business or employment relation. On the other are those who do not. The former have a cause of action for unjustified interference with that relation, because they have an immediate or existing interest which is adversely affected by the interference. The others do not have a cause of action because they do not have such an interest; so, they have not been adversely affected in the same way as the first class. This demarcation between the classes is, as we have pointed out, pages 28-30, *supra*, closely akin to differentiations which are generally made in the law. It cannot properly be deemed an unreasonable classification.

II.

The State Did Not Enforce or Compel Adherence to the Private Agreement Here Complained of. Its Only Concern With the Matter Is That It Has Not Acted Affirmatively to Prohibit Such Agreements. Such Inaction Is Not State Action Within the Meaning of the Fourteenth Amendment.

For the purposes of this section of our argument we may assume, although the record does not bear out the assumption, that it was decided below that the combination or agreement allegedly entered into by the respondents was lawful under the law of California. Upon that assumption the question with respect to the Fourteenth Amendment is, obviously, whether in those circumstances the *State* has acted to deprive petitioners of due process of law or deny to them the equal protection of the laws. Consideration of the facts at bar in the light of history and precedent compel a negative answer to that question.

First: The "principle has become firmly imbedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however, discriminatory or wrongful . . . So long as the purposes of those [discriminatory] agreements are effectuated by voluntary adherence to their terms, it would appear clear that there has been no action by the State and the provisions of the Amendment have not been violated . . ." [*Shelley v. Kraemer*, 334 U. S. 1, 13 (1948).[28]] ". . . Individual invasion of individual rights is not the subject matter of the amendment . . ." [*Civil Rights Cases, supra*, 109 U. S. at 11.[29]]

The reasons for this view of the Fourteenth Amendment are well known. They rest on more than a literal reading of the words "No State" in the amendment. They are based upon a sensitive regard for the kind of nation which the constitution created and upon the conviction that the opposite view would result in such a

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[28]Among a considerable number of other decisions to this same general effect are the following: *Barrows v. Jackson*, 346 U. S. 249, 251, 253 (1953); *Collins v. Hardyman, supra*, 341 U. S. at 657-658; *Civil Rights Cases, supra*, 109 U. S. at 10-12; *United States v. Harris*, 106 U. S. 629, 638-639 (1882); *Virginia v. Rives*, 100 U. S. 313, 318 (1879); *Screws v. United States*, 325 U. S. 91, 108-109, 140 (1945); *Hurd v. Hodge*, 334 U. S. 24, 31-32 (1948).

[29]Of the same purport are: *United States v. Cruikshank*, 92 U. S. 542, 554 (1875); *Collins v. Hardyman, supra*, 341 U. S. at 658; *Gregoire v. Biddle*, 2 Cir., 177 F. 2d 579, 581 (1949); *Love v. Chandler*, 8 Cir., 124 F. 2d 785, 786 (1942); *Bottone v. Lindley*, 10 Cir., 170 F. 2d 705, 706-707 (1948) *cert. den.* 336 U. S. 944; *Campo v. Niemeyer*, 7 Cir., 182 F. 2d 115, 118 (1950). See, *Courant v. International Photographers*, 9 Cir., 176 F. 2d 1000, 1003 (1949) *cert. den.* 338 U. S. 943.]

centralization of federal power in matters generally thought to be of local concern as to overturn our federal system. That is a fact of history which this Court recognized in the first case decided on the merits under the Amendment [*Slaughter House Cases, supra,* 16 Wall. at 77-78] and to which it has adverted on a good many occasions since.[30]

Second: This long held view of the scope of the Amendment delimits the question here. That question is not whether a line between the spheres of State and Nation

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[30]For example:

". . . if the views of the minority [in the *Slaughter House Cases*] had prevailed it is easy to see how far the authority and independence of the States would have been diminished, by subjecting all their legislative and judicial acts to correction by the legislative and review by the judicial branch of the National Government. But we need not now inquire into the merits of the original dispute. This part at least of the *Slaughter-House Cases* has been steadily adhered to by this court . . ." [*Twining v. New Jersey,* 211 U. S. 78, 96 (1908).]

". . . This decision [*United States v. Harris, supra,* 106 U. S. 629] was in harmony with that of other important decisions during that period (referring, among others, to the *Slaughter House Cases, supra,* 16 Wall. 36, and the *Civil Rights Cases, supra,* 109 U. S. 3] by a Court, every member of which had been appointed by Presidents Lincoln, Grant, Hayes, Garfield or Arthur—all indoctrinated in the cause which produced the Fourteenth Amendment, but convinced that it was not to be used to centralize power so as to upset the federal system." [*Collins v. Hardyman, supra,* 341 U. S. at 657-658.]

". . . The Fourteenth Amendment did not alter the basic relations between the States and the national government. . . . It is only state action of a 'particular character' that is prohibited by the Fourteenth Amendment . . ." [*Screws v. United States, supra,* 325 U. S. 109.]

". . . It was not intended by the Fourteenth Amendment . . . that all matters formerly within the exclusive cognizance of the states should become matters of national cor ern." [*Snowden v. Hughes,* 321 U. S. 1, 11 (1944).]

See, also, *Dorsey v. Stuyvesant Town,* 299 N. Y. 512, 87 N. E. 2d 541 (1949) *cert. den.* 339 U. S. 981.

should be drawn at all; that has long since been settled.[31] It is whether the line should be drawn at a point which would bring under Federal control the conduct here complained of. To draw it at that point, however, would required an interpretation of the Amendment amounting to a reversal of the one which it has received from this Court since the *Slaughter House Cases*.

Upon the assumption which was made at the beginning of this section of our brief [p. 40, *supra*] all that was or could have been decided below was that no positive law or rule of decision in California made unlawful or actionable the combination or agreement of the respondents. To the extent that that agreement had any effectiveness at all it was because the parties to it voluntarily adhered to it. The State courts did not enforce—they have never been asked to enforce—that agreement. They did not compel or order any of the parties to adhere to it. They imposed no sanctions, civil or penal, upon any of the parties to compel or induce adherence to it. The real complaint of petitioners, therefore, is, and it can only be, that the State has done nothing to prohibit such voluntary private agreements.

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[31] Petitioners do not in so many words seek reconsideration or reversal of this line of decision. Acceptance of their argument, however, would necessarily bring about just that result. To find "state action" in the state's inaction here would push the limits of federal authority farther than any decision of this Court has yet taken them, as we shall show in a moment. At this point, however, we may suggest that the *Civil Rights Cases* and the others which have conformed to them are as much entitled to the benefit of *stare decisis* as was *United States v. Classic*, 313 U. S. 299 (1941) [see, *Screws v. United States, supra*, 325 U. S. at 112-113] or *Federal Baseball Club v. National League*, 259 U. S. 200 (1922). [See, *Toolson v. New York Yankees*, 346 U. S. 356 (1953).]

What the argument of petitioners comes down to, then, is that the State, by its *inaction,* has permitted such agreements to be voluntarily made and performed. If that is "state action" then all private conduct not prohibited by positive State law is state action. All private conduct not so prohibited is, in this sense, "permitted" by the state. Thus, it is plain—at least when resort to a State court for relief against such unprohibited private conduct has proved futile because of the very fact that there is no prohibition against it—that all private conduct becomes state action and, therefore, subject to the Fourteenth Amendment. That, to repeat Mr. Justice Holmes' phrase uttered in a not dissimilar context, is "a result not to be thought of . . ." [*Tracy v. Ginzberg, supra,* 205 U. S. at 178.] It is not to be thought of because it would for the first time introduce into the constitution the centralizing conception of the Fourteenth Amendment against which this Court and the nation generally have stood firm.[32]

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[32]It is not difficult to think of ordinary private activity, heretofore never considered to be of anything but local concern, which would be subject to Federal legislative and judicial control if petitioners' theory were law. For example, suppose that in a State having no prohibition against closed-shop contracts all of the employers in a given industry, not engaged in interstate commerce, agreed, and induced each other to agree, that they would employ only members in good standing of a certain union. Employees discharged for non-union membership and other persons refused employment for the same reason, would thus be effectively deprived of their "right to work" at their chosen callings. If such persons brought an action against the employers, seeking relief in respect of this "monopolistic" combination, and suffered a dismissal because no law of the state made such an agreement or combination unlawful, petitioners' theory of the Fourteenth Amendment would require a holding that in so deciding the State court had deprived the plaintiffs of due process and denied them equal protection. The same would be true of a person denied admission to a private social club because of his race, religion or economic status; or of

Third: The furthest limits in this regard to which this Court has been willing to go are fairly represented, we think, by *Shelley v. Kraemer, supra,* 334 U. S. 1, *Barrows v. Jackson, supra,* 346 U. S. 249, and *Marsh v. Alabama,* 326 U. S. 501 (1946).[33] None of them, however, goes far enough to support the position of petitioners at bar. There was in each of them affirmative action by the State, through its courts or its legislature, which had the effect of putting behind the private agreements or conduct involved the coercive power of the State through civil or penal sanctions. That is obviously quite a different matter from the inaction which is all that can

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one denied admission to a fraternal or other organization which restricts its membership to persons of a specified religion or country of origin. The number of such examples is limited only by the nearly infinite variety of private activity in which men engage. All that it would take to make State action out of such private conduct would be the commencement of a lawsuit in the State court and its ultimate dismissal for failure to state a cause of action. Of course, it no doubt would be found in many cases that the conduct was justified or reasonable, and, therefore, not a violation of the Amendment. But that is not the point. The point is that the power of ultimate decision would rest in the Federal judiciary; and, necessarily, in view of section 5 of the Amendment, the power of control and regulation would reside in the Congress.

[33] *Rice v. Sioux City Memorial Park Cemetery,* 348 U. S. 880 (1954) *affirming,* by an equally divided court, *Rice v. Sioux City Memorial Park Cemetery,* 245 Ia. 147, 60 N. W. 2d 110 (1953) is of little help. Because of that equal division in the first instance and the subsequent rehearing and dismissal of the writ of certiorari [*Rice v. Sioux City Memorial Park Cemetery,* 349 U. S. 70 (1955)], it cannot be taken as having settled the question one way or the other. The fate of that case in this Court does show, however, that the constitutional question with which we are concerned is one which should not be reached except upon a record inexorably calling for its decision. The case at bar is not such a case, for the reasons to which we have adverted at length. [Point I, *supra,* pp. 23-40.] In this connection, we may properly notice the traditional reluctance of this Court to reach constitutional problems of grave import when it is not absolutely necessary to do so. [See, *e.g., Collins v. Hardyman, supra,* 341 U. S. at 659.]

be charged to the State in the instant case. It is one thing for a court to hold only that no law of the State prohibits voluntary adherence to some private compact. It is another matter entirely for a court, in addition to so holding, to compel or coerce adherence to that compact by injunction, an award of damages, or criminal punishment.

Petitioners' main reliance on the issue of state action seems to be *Marsh v. Alabama, supra,* 326 U. S. 501. [Br. 16, 36-47] Whatever may be the sweep of some of the language appearing in the majority opinion in that case, the actual holding was carefully limited to a ground which conforms to conventional Fourteenth Amendment doctrine. It cannot be overlooked that in *Marsh* this Court was reviewing a judgment of conviction under a penal statute of the State of Alabama. That statute, as interpreted and applied by the State court, had the direct and necessary effect of putting behind the private conduct there complained of the whole coercive power of Alabama's criminal law. It was, therefore, much more than a case of state inaction; it was a case of affirmative and effective legislative action by the State directed toward restricting the defendant's freedom of speech and religion. That is made clear by the following excerpts from the majority opinion: [326 U. S. at 505, 508, 509. Italics ours.]

> ". . . For it is the state's contention that the mere fact that all the property interests in the town are held by a single company is enough to give that company power, *enforceable by a state statute,* to abridge these freedoms.

". . . The managers appointed by the corporation cannot curtail the liberty of press and religion of these people consistently with the purposes of the Constitutional guarantees, and *a state statute, as the one here involved, which enforces such action by criminally punishing those who attempt to distribute religious literature* clearly violates the First and Fourteenth Amendments . . .

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". . . the circumstance that the property rights to the premises where the deprivation of liberty, here involved, took place, were held by others than the public, is not sufficient to justify the State's permitting a corporation to govern a community of citizens so as to restrict their fundamental liberties and the *enforcement* of such restraint *by the application of a state statute. In so far as the State has attempted to impose criminal punishment on appellant* for undertaking to distribute religious literature in a company town, *its* action cannot stand. . . ."

Fourth: Petitioners also present the theory that activities, of a private business which may be regulated by the State because it is "affected with a public interest," become in some way state action. [Br., 39-47] That theory was much more clearly spelled out in the historic dissent of Mr. Justice Harlan in the *Civil Rights Cases, supra,* 109 U. S. at 37-42, 57-59, in which he drew upon the discussion of the concept of business "affected with a public use" in *Munn v. Illinois, supra,* 94 U. S. 113. But a great deal has happened to that concept since 1876. However useful it may then have been to make palatable the unpleasant, even hated, fact of government regulation

of business, it has long since served its purpose.[34] Today all business, indeed, virtually all private conduct, may be regulated by the State in the public interest, regardless of whether it is or is not affected with a public use in the technical common law sense. [*Nebbia v. New York, supra,* 291 U. S. at 537; *Day-Brite Lighting v. Missouri, supra,* 342 U. S. at 423-424.] Consequently, if the power of regulation were to be made the criterion of state action, all such regulable conduct would meet the test. The argument adumbrated by petitioners is merely another way of urging adoption of that centralizing view of the Fourteenth Amendment which never, since the Amendment was adopted, has been able to command the approval of this Court.[35]

Fifth: While petitioners' attack on the judgment below as a denial of rights secured by the Fourteenth Amendment has taken a wide range it need not be answered line by line. Unless the matters of which they complain can be said to have been the product of some action by

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[34]It is not out of place to observe that the reasoning of Mr. Justice Field's dissents in *Munn v. Illinois, supra,* 94 U. S. at 136, 139-143, 145-147, and the *Slaughter House Cases, supra,* 16 Wall. at 88-89—on their face apparently nothing more than a vigorous defense of the right to pursue the common callings and to hold private property without interference or restraint from the State—supplied the materials from which was fashioned the now rejected Lochner-Coppage-Adkins philosophy, which so stringently confined the area of State legislative activity in matters of social and economic significance. A reversion to that philosophy, even though indirectly, coupled with that view of the scope of the Fourteenth Amendment which did not prevail in the *Civil Rights Cases,* would indeed reduce the States to mere subdivisions or provinces of the national government.

[35]Except, perhaps, during that period when the Lochner-Coppage-Adkins philosophy held the ascendancy with a majority of this Court.

the State the Fourteenth Amendment is inapplicable. For the most part, petitioners' argument simply assumes the disputed question in that regard; but their assumption cannot be upheld for the reasons already noted. [Point II, *supra*, pp. 40-47.] With the destruction of that assumption, their argument collapses.

Nevertheless, a few additional words may be said in respect of some of their specific contentions. For example, they assert at length and in varying phraseology that they were denied the right to work except at the price of surrendering constitutional rights. [Br., 21-45, 92-98] But that denial, as their own discussion shows, was the result of voluntary adherence to a voluntary private agreement. To the support of their position they cite a large number of decisions holding or recognizing the rule that while a State may exclude a foreign corporation entirely it cannot condition admission upon a denial or curtailment of constitutional rights. [For example, *Terral v. Burke Construction Co.*, 257 U. S. 529 (1922); *Frost Trucking Co. v. Railroad Commission*, 271 U. S. 583 (1926).] We need not take issue with those decisions, although they have not always met with complete approbation. Manifestly they deal with a restriction on the action of a *State*. That is far different from a limitation upon private conduct which, even if arbitrary or discriminatory, does not come within the proscription of the Fourteenth Amendment. [*Shelley v. Kraemer*, *supra*, 334 U. S. at 13.] For the same reason, cases such as *Truax v. Raich*, 239 U. S. 33 (1915), *Takahashi v. Fish and Game Commission*, 334 U. S. 410 (1948), and the like, which deal with arbitrary restrictions on the right to work imposed by positive legislative enactment, are also beside the point.

Relying on pretty much the same line of decision treating of so-called "unconstitutional limitations" on the admission of foreign corporations, petitioners strenuously argue that they have been denied "access to courts of the state . . ." [Br., 33-36] It is impossible to understand that argument. The cases cited have nothing whatever to do with the proposition for which they are offered. Furthermore, petitioners had complete access to the courts. Their complaint was filed. Its sufficiency as a matter of law was carefully considered and determined after due notice to them and opportunity to be heard, at which hearing they appeared. They had the benefit of an appeal, which *they* took, and upon which they were fully heard. [R. 2, 29, 56 (fol. 153), 57, 63.] Surely, "access to the courts" means no more than this. Most certainly it does not mean that a suitor, defeated after a full and fair hearing in accordance with the State's "settled usages and established modes of procedure" [see, *Tracy v. Ginzberg, supra*, 205 U. S. at 178] has been denied that access simply because judgment went against him.

Petitioners assail the discussion in the opinion of the District Court of Appeal concerning judicial notice [Br. 87-92] and the effect of the facts so noticed on the applicability of certain sections of the California Labor Code. [Br. 104-106] Aside from the fact that this was wholly a matter of the state law, it is conceded that the decision below was not based on it. The contention presents nothing for review here. [See, note 19, *supra*, p. 17.]

They also attack the merits of the argument made by us below with respect to the matters establishing justification for the alleged interference with business relations. [Br. 106-115] Perhaps the Fourteenth Amendment prob-

lems which they see in that theory of defense might have arisen had the State court based its affirmance of the judgment of dismissal upon that ground. The question was never reached in the District Court of Appeal. [R. 77]. It did not have to be reached. We assume that this Court is not interested in rendering what could only be, in this regard, an advisory opinion upon an abstract or moot question.

Petitioners' most vigorous and vehement argument is reserved for their attack on the motives of the House Committee on Un-American Activities. [Br. 51-59, 68-80] This raises a question never before brought forward in the instant case.[36] The argument is akin to that made in *Watkins v. United States*, 354 U. S. 178, 199-200 (1957) —a case which, unlike the one at bar, necessarily and directly involved the legality of the Committee's procedures. The argument was there disposed of as follows:

> ". . . But a solution to our problem is not to be found in testing the motives of Committee members for this purpose [exposure for exposure's sake]. Their motives alone would not vitiate an investigation which had been instituted by a House of Congress if that assembly's legislative purpose is being served."

The presence of some members and employees of the House Committee as respondents here does not make out

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[36]There is, therefore, no adequate record upon which to base any exploration of that question. Certainly more is needed for an informed decision than the fragmentary excerpts from the record of some hearings (with which petitioners had nothing to do) obviously carefully screened and selected to make a point. [See also, cases cited, note 20, *supra*, p. 19.] In that state of the record we do not think it necessary to extend an already overlong brief with an analysis, correction or supplementation of petitioners' materials, which, like their material, would have to be based on matters outside the record at bar.

a case of state action. They were not officers or agents of the State of California. As agents or agencies of the Federal Government it is not the Fourteenth but the Fifth Amendment which imposes any restrictions upon them. [Cf., *Corrigan v. Buckley*, 271 U. S. 323, 330 (1926); *Shelley v. Kraemer*, *supra*, 334 U. S. at 8-9; *Courant v. International Photographers*, *supra*, 176 F. 2d at 1001-1002, 1003.] No question under the due process clause of the Fifth Amendment has heretofore been raised in this case.[37]

III.

Questions Raised Which Are Outside the Scope of the Questions Presented by the Petition for Certiorari Should Not Be Considered.

Petitioners have discussed a number of other questions dealing with asserted denial of their right of free speech and association under the First Amendment [Br. 51-80], and of their right to appear as a witness before Committees of the Congress and there invoke the self-incrimination privilege [Br. 81-87.] These, too, are new questions in the cause. Furthermore, they are outside the scope of the questions presented in the petition for certiorari, as indeed are a number of other questions discussed.[38] Nevertheless, we shall discusse them briefly.

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[37]With respect to these respondents the only contention peculiar to them which petitioners raised below was that the doctrine of governmental immunity from liability for torts did not apply. [Opening Brief in District Court of Appeal, 42-44] That, too, was a question not decided because it was not necessary to decide it. [R. 77]

[38]Aside from one going to jurisdiction, the only question presented in the petition for certiorari was whether the dismissal of petitioners' complaint because of its failure to allege an existing or prospective employment "was contrary to law and the supremacy clause of Article VI of the Constitution, deprived petitioners of their liberty without due process of law and denied petitioners the equal protection of the laws, in violation of the equal protection

First: The fallacy in petitioners' First Amendment argument is the same one which vitiates their claim of denial of due process under the Fourteenth. The First Amendment, which is historically and literally a restriction only upon the national government [*Talton v. Mayes*, 163 U. S. 376, 382 (1896)], can be applied to the States only if the freedoms which it guarantees are part of the due process secured by the Fourteenth Amendment. The denial of these freedoms, as with any other right secured by the Fourteenth Amendment, must, therefore, be found in some action of the State. That vital element is wanting here. [Point II, *supra*, pp. 40-52.]

If there has been an interference with First Amendment freedoms shown in this case at all, it was not an interference by the State of California. An interference brought about by lawful, or even unlawful, private conduct does not bring the Fourteenth Amendment into play. [Compare, *Collins v. Hardyman*, *supra*, 341 U. S. 651. Also, the cases cited, notes 28, 29, *supra*, p. 41.]

Actually, petitioners' argument in this respect is no more than a statement of reasons which would justify a State, as a matter of policy, in prohibiting conduct of

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and due process provisions of the Fourteenth Amendment." [Pet., 3-4] General as this language may be it does not embrace such questions as whether rights under the First or Fifth Amendments have been violated; whether the Committee's motives or procedures were proper and, if not, whether that gave petitioners any cause of action; or whether the State courts correctly applied the decisional law of the State. [*Roth v. United States*, 354 U. S. 476, 490, n. 27 (1957), with which compare the order granting certiorari, *Roth v. United States*, 352 U. S. 964 (1957).] Customarily, this Court has limited its consideration to those questions presented by the petition for certiorari. [*Mazer v. Stein*, 347 U. S. 201, 208 (1954); *National Licorice Co. v. Nat. Lab. Rel. Bd.*, 309 U. S. 350, 357, n. 2 (1940); *Irvine v. California*, 347 U. S. 128, 129-130 (1954); *General Talk Pic. Corp. v. Western Electric Co.*, 304 U. S. 175, 177-178 (1938).]

the sort discussed. It does not, however, bear on the question whether the State of California has deprived these petitioners of any constitutional right secured to them.

Second: We need not here debate the question whether, notwithstanding the supremacy clause or the Fifth Amendment, a State may restrict or confine the self-incrimination privilege secured by the Fifth Amendment. The State of California has not attempted any such restriction; and nothing in the decision below put any approval upon such an attempt had it been tried. The Court below did not decide that the alleged combination, denying employment to those who invoked that privilege, was or was not lawful either under State law or Federal law. Decision went off on other grounds, making decision of the question to which petitioners address themselves quite unnecessary.[39] [Statement of the Case, *supra*, pp. 15-17.]

So far as the argument of petitioners depends on the due process clause of the Fifth Amendment, the answer is substantially the same as has been given in relation to the Fourteenth. [Point II, *supra*, pp. 40-48.] The Fifth Amendment does not create rights in one individual against another. It is directed against the action of the national government. [*Corrigan v. Buckley, supra*, 271

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[39]Actually the matter of the self-incrimination privilege was only a collateral matter below, involved in the question whether respondents' alleged interference with business was or was not justified in the technical meaning of "justification" in tort law. The question of justification *vel non* was not decided; and so there was no decision of any question under the Fifth Amendment or the supremacy clause in regard to the self-incrimination privilege. [Point II, *Fifth, supra*, pp. 50-51.]

U. S. at 330 (1926); *Courant v. International Photographers, supra,* 176 F. 2d at 1003.]

Third: Much of petitioners' argument is directed at what they conceive to be the error of the decision below as a matter of State law. [Br. 25-26, 27-31, 42-45, 93-106.] The answer to that argument has already been indicated and need not be repeated. [Point I, C, *supra,* pp. 37-40.]

Conclusion.

The writ of certiorari should be dismissed for want of jurisdiction. If, however, it is determined that jurisdiction of the merits exists, the judgment of the District Court of Appeal should be affirmed.

Respectfully submitted,

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